Filed 1/16/09 P. v. Hollie CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. YVETTE HOLLIE, Defendant and Appellant.	A118315 (Solano County Super. Ct. No. FCR217383)

In connection with the stabbing of James Ingram, a jury found Yvette Hollie guilty of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)),[1] and found true an allegation that she had personally inflicted great bodily injury (GBI) on Ingram under circumstances involving domestic violence (§ 12022.7, subd. (e)). The jury acquitted Hollie of attempting to murder Ingram. (§§ 664, 187, subd. (a).) Hollie now appeals from the judgment sentencing her to nine years in prison.

She makes three arguments on appeal: (1) the trial court erred when it refused to instruct on self-defense; (2) imposition of the upper term for the GBI enhancement violated dual use proscriptions as well as *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*); and (3) to the extent that Hollie's trial counsel failed to object to the imposition of the upper term based on dual use or *Cunningham*, her counsel provided ineffective assistance in violation of her federal constitutional rights. We conclude that the trial court did not err when it refused to instruct on self-defense because there was no

[1] Unless otherwise noted, all statutory references are to the Penal Code.

substantial evidence to support self-defense instructions. We also conclude that defense counsel provided ineffective assistance by failing to object to the imposition of the upper term on the GBI enhancement. We thus reverse the judgment and remand the matter to the trial court for the limited purpose of resentencing.

FACTUAL BACKGROUND

A. The Victim's Version of the Stabbing

Ingram testified that at the time of the stabbing, July 2004, he was living with Hollie in an apartment in Fairfield. They had been in a romantic relationship and living together for about four years. At that point, their relationship was rocky. They had financial problems, and were being evicted from their apartment for not paying rent. Ingram was also using drugs. Although Ingram denied ever being violent toward Hollie, he testified that Hollie would "jump in [his] face, punch on [him] sometimes." Ingram kept telling Hollie that he was going to leave her.

One source of discord in the relationship was that Hollie refused to engage in certain sex practices that he preferred. However, Ingram denied ever forcing Hollie to have sex with him against her will.

At about 10:30 p.m. on July 26, 2004, Ingram went to the bedroom to watch television before going to sleep. Hollie left the apartment at that point and Ingram did not see her again until the following morning. Ingram did not know where she went.

Ingram awoke between 6:30 and 7:30 a.m. on the following morning to go to work and saw Hollie enter the apartment through the front door. Apart from Ingram and Hollie, no one else was in the apartment at the time and no one else had been in the apartment during the night. After Ingram got out of bed, Hollie entered the bedroom from the living room area and approached him. She did not say anything and had no particular expression on her face. Ingram did not see Hollie raise her hand, and did not see anything in Hollie's hand. Suddenly, without warning, Ingram felt a sting on his right side, just below his right armpit. Although he did not see what happened, because "it happened so fast," he thought Hollie had stabbed him there. Ingram asked her, "What did you do to me?" as "blood just started shooting everywhere." Ingram begged Hollie to

help him and not to kill him. Hollie "kept coming at" Ingram, stabbing him in the arm as Ingram tried to protect himself from her.

Ingram tried to use the telephone, but Hollie "snatched it out the wall." Ingram then ran from the apartment and banged on his neighbor's door to ask for help, and waited outside the apartment for the police to arrive.

Ingram did not talk to the police when they arrived at his apartment. At that point, he was scared and his primary concern was survival. After he got out of the hospital and before trial, Ingram did not speak to the police about the incident and did not tell them that Hollie had stabbed him. He did not like talking about what happened. He could not recall speaking to the police while he was at the hospital.

Ingram underwent surgery to repair a hole in his heart, and to repair two lacerations to his left forearm. Before his surgery, Ingram told the treating surgeon that he had been stabbed, but did not want to give any additional information. The surgeon said he did not think Ingram "really knew exactly what happened." The surgeon agreed it was possible that Ingram's wounds were inflicted during a very brief struggle between two individuals. However, he also explained that usually the wounds he sees when two people have been fighting are "to both hands, both arms, and both participants." Ingram was hospitalized for two to three weeks. And at the time of trial, he breathed with the assistance of a ventilator machine at night.

Ingram denied that Hollie had attacked him and sprayed him with some type of aerosol spray that night or morning. He also denied wrestling with Hollie on the bed before he was stabbed.

B. Police Testimony

Early July 27, 2004, Fairfield Police Officer Joshua Kresha responded to the reported stabbing. When Kresha arrived at the apartment, Hollie flagged him down, told him there had been a stabbing, and directed him to Ingram, who stood naked and bleeding near the doorway. Kresha asked Hollie if there were any suspects or other victims still inside the apartment. She said there were not. Kresha did a sweep of the

apartment and found no one. In the master bedroom, he found a large amount of blood on the bed and on the floor, and a pornographic video playing on the television.

At this point, the paramedics and fire personnel had arrived and were treating Ingram. Kresha asked Hollie what had happened. She told him that "she had been laying down on the couch in the front room sleeping, and at about midnight, she had been watching pornographic videos, and she had awoken before [Kresha] had got there to find that . . . Mr. Ingram had been stabbed, and she ran out of the apartment to go to a neighbor's house to call 911." Hollie also told Kresha that no one else had been inside the apartment that night or morning.

Kresha noted that, inconsistent with Hollie's version of events, there was no pornographic video playing in the living room at the time he conducted the sweep of the apartment. However, there was a pornographic video playing in the master bedroom. When Kresha asked Hollie to explain this discrepancy, Hollie had no reply.

During the interview with Kresha, Hollie never said that she had been attacked by Ingram that night or morning, never said she was afraid of Ingram, and never said that Ingram had asked her to have unwanted sex with him. Kresha could not recall Hollie being upset, distraught, or incoherent at the time. She was cooperative and did not seem confused.

A police technician who entered the apartment that morning found substantial amounts of blood on the bed sheets and on and around the bed in the master bedroom. On the bed, he found a knife with red stains on its five-inch blade. The knife appeared to be a steak knife that came from a set of knives found elsewhere in the apartment. The technician opined that, based on the trail of blood in the apartment, the bloodstains seemed to originate in the master bedroom and lead to the front door. The technician agreed that the messed up and bloody sheets and bed indicated the possibility of a struggle, and agreed that the only place where a struggle might have taken place was the master bedroom. However, he also agreed that the sheets could have been disheveled simply from someone "sleeping throughout the night and tearing the sheets up." The

technician was not aware of any information indicating that anyone other than Ingram was bleeding at the apartment that night or morning.

The lead police investigator, Fairfield Police Detective Joshua Cohen, was called by the defense to testify. Cohen spoke with Ingram at the hospital on the day of the stabbing. Ingram told Cohen that he had been wrestling with Hollie on the bed and that she had stabbed him. He said that there had not been any problems and he did not know why she would have stabbed him. When Cohen asked Ingram why they were wrestling on the bed, Ingram told Cohen that "he couldn't tell [Cohen] why." Ingram said that Hollie had suddenly stabbed him with a knife. He did not know where Hollie had gotten the knife, but offered as a possible explanation that he and Hollie sometimes left things in their bedroom. Ingram told Cohen that he did not want Hollie prosecuted, but he "simply wanted to get better so he could move away from her."

Cohen later spoke with Hollie, who denied stabbing Ingram. She also denied arguing with Ingram before the stabbing, either in the morning or the previous night. Hollie never asked Cohen about Ingram's injuries or showed any concern about his condition.

When Hollie was booked into jail the morning of the stabbing, the correctional officer who interviewed Hollie noted that she was not injured or sick, but Hollie did tell the officer that she suffered from seizures. Because of her history of seizures, Hollie was also cleared by a nurse before she entered the jail.

C. Hollie's Version of the Stabbing

Hollie testified that she suffered from epilepsy and had epileptic seizures, for which she took medication. Before the stabbing incident, there had been no instances of domestic violence between herself and Ingram. She described their relationship as generally harmonious. Although Ingram testified that she had pushed him in the chest on occasion, she did not remember any such incidents.

However, over the course of several years prior to the incident, Ingram's sexual interests changed and their sexual relationship became one-sided in Ingram's favor. By July 2004, Hollie had expressed concern to Ingram about his sexual practices and she

tried to avoid participating in them. Hollie also started sleeping on the couch in the living room.

On the evening of July 26, 2004, Hollie made a steak dinner for Ingram and herself. There were no arguments or disputes of any kind during the meal. At some point, Ingram took his dinner plate, a steak knife, and a fork into the bedroom. Hollie fell asleep while watching television on the living room couch. She woke up sometime between 11:00 and 11:30 p.m. At that point, she tried to use the toilet, but Ingram would not allow her to do so because he did not want her to turn on the bathroom light. Hollie said she did not use the bathroom with the light off because she "didn't want to." Around this time, Hollie smoked cocaine with Ingram in the master bedroom.

After Hollie could not get past Ingram to use the bathroom, she returned to sleeping on the couch. She tried a second time to use the toilet between 3:30 and 4:00 a.m., at which point Ingram told her that he wanted to have sex with her. Hollie refused, saying she was tired.

After Hollie twice told Ingram that she did not want to have sex, Ingram entered the bathroom and attacked her. He snatched her off the toilet by her head and struck her in the head with the handle of a steak knife. He also hit her with his fist on her head, shoulders, back, and chest. Hollie was bleeding from the laceration to her head caused by the knife handle. During the struggle with Ingram, Hollie sprayed him with an aerosol can of air freshener. While she was spraying him, he turned away from her, slipped in the bathroom doorway, and fell on the knife blade, causing his stabbing injury. She managed to break away from Ingram and dial 911 on the telephone. However, she was not able to speak to an operator because Ingram, although wounded by his fall onto the knife, leapt onto the bed.

After all this, Hollie lost consciousness on the living room couch as a result of Ingram's earlier blows to her head and body, as well as her epilepsy medication. She awoke when Ingram screamed and yelled for her to call 911. Up to that point, Hollie did not notice that Ingram had a stab wound. She then saw that Ingram was bleeding from his chest. When he asked her to help remove a knife blade from his chest, she vomited

into her hands and then went into the bathroom. She saw Ingram remove the blade and lay it on the bed. She tried again to call 911, but Ingram told her that she could not use the phone because it was not plugged in; and she could not find her cell phone.

Hollie went next door to ask for help. Her neighbor's son called 911 for her. While Hollie was doing this, Ingram came outside and knocked at another neighbor's apartment, asking the occupants to call 911. By this time, it was day break.

Ingram told Hollie immediately after the incident that there was another person in the apartment. After she returned from the neighbor's apartment, she saw Ingram handing dildos and female undergarments to an unseen person on the apartment's patio.

Hollie never told anyone, apart from her defense attorneys, that Ingram had attacked her, or that Ingram had fallen on his knife. She denied ever stabbing Ingram, and denied lashing out at him with a knife or any other sharp object on the morning of July 27. She denied ever grabbing a knife after she had broken away from Ingram. She said she never wrestled with Ingram on the bed, nor struggled with him over a knife.

DISCUSSION

I. Denial of Request for Self-Defense Instructions

a. Procedural Background

At the conclusion of trial, defense counsel asked for jury instructions on self-defense. Although he acknowledged that Hollie's testimony did not lay the groundwork for self-defense, he argued that there was factual support for a self-defense instruction based on Detective Cohen's testimony that Ingram said he had been wrestling with Hollie on the bed before the stabbing. He argued that Cohen's testimony was sufficiently detailed and specific to support a self-defense instruction.

When the trial court asked defense counsel whether he would rely on self-defense during closing argument, defense counsel responded, "I can't actually claim that I am, Your Honor. But I'm just telling the Court that there may be some facts which support that and which some jurors may want to hear or may want to consider." When asked whether a self-defense instruction would be inconsistent with Hollie's defense, counsel acknowledged that Hollie did not testify about wrestling with Ingram.

The trial court denied the request for self-defense instructions, finding that there was no substantial evidence in support, and that such instructions would be inconsistent with the theory the court anticipated the defense would argue based on Hollie's testimony: "that Mr. Ingram fell on this knife after he had been in the bathroom with her." The court explained that in light of Hollie's testimony and statements to police, "There was never any indication by her at any time that she stabbed the complaining witness and did so in self-defense." Specifically, the court declined to instruct the jury with CALCRIM No. 3470 on the right to self-defense, and also modified CALCRIM No. 875, which sets forth the elements of assault with a deadly weapon, to delete the fifth element of that instruction: "The defendant did not act in self-defense." (See CALCRIM No. 875 (May 2008 ed.), Bench Notes [the self-defense element should be included in the instruction only if "there is sufficient evidence of self-defense"].)

In his closing argument, defense counsel did not tell the jury that Hollie acted in self-defense. Instead, he asserted that neither Ingram nor Hollie told the truth about what happened that night. He argued that the physical evidence showed that there was a struggle in the bedroom between Ingram and someone else that night, and suggested that both Ingram and Hollie lied to protect a third, unidentified person, possibly one of Hollie's grown sons.

b. Analysis

Defendant argues the trial court erred in denying defense counsel's request for CALCRIM No. 3470 and in deleting from CALCRIM No. 875 the self-defense element. We conclude that the trial court properly refused to instruct on self-defense because there was no substantial evidence to support such instructions.

When a defendant requests an instruction, the trial court does not err in refusing to give the instruction if there is no substantial evidence to support it. (*People v. Flannel* (1979) 25 Cal.3d 668, 684 & fn. 12 (*Flannel*); see also *People v. Breverman* (1998) 19 Cal.4th 142, 154.) Substantial evidence in this context means "evidence from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist." (*People v. Blair* (2005) 36 Cal.4th 686, 744-745 (*Blair*).) It

is not the case that "jury instructions must be given whenever *any* evidence is presented, no matter how weak." (*Flannel, supra*, 25 Cal.3d at p. 684, fn. 12.) Evidence which is "minimal and insubstantial" does not trigger the duty to instruct. (*Id*. at p. 684.) "The trial court is not required to present theories the jury could not reasonably find to exist." (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.) On appeal, we review independently whether the trial court erred in refusing to instruct on self-defense. (See *ibid*.)

To support a self-defense instruction for an assault charged under section 245, there must be substantial evidence that: the defendant had an honest and reasonable belief that bodily injury was about to be inflicted on her (*People v. Goins* (1991) 228 Cal.App.3d 511, 516); the threat of bodily injury was imminent (see *In re Christian S.* (1994) 7 Cal.4th 768, 783); and the defendant used force against her aggressor that was reasonable under the circumstances (*People v. Pinholster* (1992) 1 Cal.4th 865, 966). (See also CALCRIM No. 3470.) Here, there simply was no substantial evidence of a self-defense scenario: there was no evidence that when Hollie stabbed Ingram, she actually and reasonably believed that Ingram was about to inflict bodily injury on her or that Ingram was acting as an aggressor at the time.

Ingram's version of events was that Hollie stabbed him out of the blue and without warning, after an uneventful night and early morning. As Hollie acknowledges on appeal, Ingram "told the jury he did not see [Hollie] raise her hand or actually stab him. He denied telling the police that before the stabbing [Hollie] sprayed him with some type of aerosol, and he emphatically denied telling police that he and [Hollie] had been wrestling on the bed before the stabbing." In sum, none of Ingram's trial testimony supported self-defense instructions. Nor did Hollie's.

Hollie's version of events was that although she struggled with Ingram in the bathroom, she did not stab him. Instead, Ingram stabbed himself when he tripped in the bathroom and accidentally fell on the knife. She denied ever wrestling with Ingram on

the bed, and denied ever struggling with him over a knife.[2] Her statements to police were similar: Hollie denied stabbing Ingram, denied arguing with him before the stabbing, and never said that Ingram had attacked her or had asked her to have unwanted sex. Thus, none of Hollie's testimony or pre-trial statements supported self-defense instructions.

The only evidence conceivably supporting a self-defense theory is (1) Detective Cohen's testimony that, while at the hospital, Ingram had told Cohen that he had been wrestling on the bed "with Ms. Hollie and that she had stabbed him" and (2) the police technician's testimony that the disheveled and bloody sheets and bed indicated the possibility of a struggle. This evidence is "minimal and insubstantial." (*Flannel*, *supra*, 25 Cal.3d at p. 684.) A jury composed of reasonable persons could not conclude from this evidence that a self-defense scenario existed. (See *Blair*, *supra*, 36 Cal.4th at pp. 744-745.)

With respect to Cohen's testimony, there was no elaboration on the nature of the wrestling, such as who, if anyone, was the aggressor, or whether Ingram and Hollie wrestled over a knife or while holding a knife. Cohen testified that during this same hospital interview Ingram said he could not "tell" why Ingram and Hollie were wrestling. Moreover, there was no indication that the wrestling led to or immediately preceded the stabbing. Ingram said during the hospital interview that the stabbing happened "suddenly", and said that there had not been any problems beforehand. He did not know why Hollie would have stabbed him.

With respect to the police technician's testimony, he simply said that a struggle was *possible* based on the fact that the bed sheets were disturbed and bloody. He later testified that another possible explanation for the disheveled sheets was that someone sleeping there tore the sheets up while he slept.

Hollie argues that the jury could have relied on both Hollie's and Ingram's testimony, as well as "the impeachment evidence and prior inconsistent statements," to

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[2] Contrary to what Hollie asserts on appeal, she never said that she "did not remember wrestling with Ingram," but simply denied doing so.

conclude that Hollie stabbed Ingram to defend herself after he had "forced her into the bedroom and started wrestling with her on the bed, attempting to coerce [Hollie] into unwanted sex." According to Hollie, "the bathroom and bedroom scenarios described by [her] and Ingram created the possibility that [she] was initially assaulted or battered by Ingram and that, fearful of bodily injury or a sexual assault – or both – [Hollie] stabbed Ingram in self-defense."

We are not persuaded. The mere "possibility" of a self-defense scenario created by selectively combining Hollie's and Ingram's statements and testimony is insufficient to trigger the trial court's obligation to give self-defense instructions. Asking the jury to consider this scenario, which was not supported by any evidence, would have been tantamount to asking the jury to speculate.

Hollie relies on *People v. Keel* (1928) 91 Cal.App. 599 (*Keel*) to argue that she was entitled to have the jury consider self-defense even though a theory of self-defense was "inconsistent with her denial of the act of stabbing." In *Keel*, the victim died after receiving a cut in a fight in which several men participated and in which several men were also cut. (*Id*. at p. 600.) "No witness could swear that he saw the first blow struck in the fight" which led to the victim's death, or that he saw "the actual cutting of" the victim. (*Ibid*.) Defendant admitted during his testimony that he was involved in the fight that led to the victim's death, but denied that he cut the victim. (*Id*. at p. 604.) After he was convicted of manslaughter, but acquitted of murder, defendant argued that the trial court erred in refusing to instruct the jury on self-defense. (*Id*. at p. 600.)

The Court of Appeal agreed this was error, despite the fact that the defendant had denied during his testimony that he cut the victim. (*Keel, supra*, 91 Cal.App. at p. 606.) The court concluded that the evidence "raise[ed] the issue of self-defense." (*Id*. at p. 605.) Significantly, the prosecution's primary witness testified that he saw the victim pick "up an automobile jack" and throw "it at the defendant" before the defendant pulled a blade from his coat pocket. This witness had testified at the preliminary hearing that the defendant opened his knife while the victim was running after him. (*Id*. at p. 601.) In addition, the defendant testified that on the evening of the incident the victim's associate

had threatened the defendant with a knife (*id.* at pp. 604, 606), and there was testimony from other witnesses that the victim or his associates attacked the defendant with automobile tools or other heavy objects, and that the victim ran after the defendant and jumped on top of him. (*Id*. at pp. 602, 606.)

It is true, as Hollie asserts, citing *Keel*, that "criminal defendants normally are permitted to advance inconsistent defenses and may deny an act but also claim self-defense." However, their right to do so does not eliminate the requirement that there be substantial evidence of self-defense somewhere in the record before a self-defense instruction must be given. In *Keel*, several percipient witnesses "raise[ed] the issue of self-defense" because they testified that the victim and his associates acted as aggressors toward the defendant during the fight leading to the victim's death. (*Keel, supra*, 91 Cal.App. at pp. 601-605.) In contrast, the only two eyewitnesses to the stabbing, Ingram and Hollie, never said that Hollie stabbed or inflicted any injuries on Ingram in circumstances where Ingram acted as an aggressor: either the stabbing happened out of the blue or it was self-inflicted. And as discussed above, the evidence suggesting the possibility of a self-defense scenario was minimal and insubstantial.

Finally, even assuming it was error not to instruct on self-defense – which it was not – such an error would be harmless even under the more rigorous test enunciated in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). (See *People v. Salas* (2006) 37 Cal.4th 967, 984 [our Supreme Court has "not yet determined what test of prejudice applies to the failure to instruct on an affirmative defense," but "even assuming the more rigorous *Chapman* test applies," the failure to instruct was harmless].) As discussed in detail above, the evidence suggesting self-defense was very weak. Consequently, there can be no reasonable doubt that had the jury been instructed on self-defense, it would have returned the same verdicts.

II. Imposition of the Upper Term on the GBI Enhancement

a. Procedural Background

The jury convicted Hollie of assault with a deadly weapon (§ 245, subd. (a)(1)), and also found that Hollie personally inflicted great bodily injury upon Ingram under

circumstances involving domestic violence within the meaning of section 12022.7, subdivision (e).[3] In addition, five aggravating circumstances were submitted to the jury pursuant to *Cunningham,* two of which the jury found to be true: (1) that the crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness; and (2) that Hollie was armed with or used a weapon at the time of the commission of the crime. (See Cal. Rules of Court, rule 4.421(a)(1), (2).) The jury did *not* find true three of the aggravating circumstances: (1) that the victim was particularly vulnerable; (2) that the manner in which the crime was carried out indicated planning, sophistication, or professionalism; and (3) that Hollie took advantage of a position of trust or confidence to commit the offense. (See Cal. Rules of Court, rule 4.421(a)(3), (8), & (11).)

In recommending imposition of the aggravated term on both the section 245 conviction and the GBI enhancement, the probation officer's report relied not only on the two aggravating factors found true by the jury, but also on the following aggravating factors which the jury was *not* asked to consider: "Rule 4.421 (b)(1): The defendant has engaged in violent conduct which indicates a serious danger to society. [¶] Rule 4.421 (b)(2): The defendant[] has a significant prior record and her record is increasing in seriousness." Regarding Hollie's criminal record, the report noted "that it is significant and spans almost 20 years. She has several misdemeanor offenses, mostly theft related and three prior felony convictions."

In defense counsel's sentencing brief, he argued that the aggravating factors found true by the jury were all "either an integral part of the assault charge, or the

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[3] Section 12022.7, subdivision (e) provides that "[a]ny person who personally inflicts great bodily injury under circumstances involving domestic violence in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three, four, or five years. As used in this subdivision, 'domestic violence' has the meaning provided in subdivision (b) of Section 13700." Section 13700, subdivision (b) defines "domestic violence" in relevant part as "abuse committed against an adult . . . who is a . . . cohabitant . . . , or person with whom the suspect . . . is having or has had a dating . . . relationship."

enhancement," whereas the jury found the "relevant factors to be *not* true." And at the sentencing hearing defense counsel asserted that there were no "significant aggravating factors" based on these findings by the jury.

Before sentencing, the court raised the issue with counsel "that factors in aggravation that were relied on in part by the probation department were found to not be true by the jury" or were not submitted to the jury. The court also noted that the second aggravating factor found true by the jury – Hollie was armed with or used a weapon when she committed the crime (Cal. Rules of Court, rule 4.421(a)(2)) – is an element of assault with a deadly weapon.

After denying probation, the trial court sentenced Hollie to nine years in prison consisting of two consecutive upper terms: the upper term of four years for assault with a deadly weapon (§ 245, subd. (a)(1)) and the upper term of five years for the GBI enhancement (§ 12022.7, subd. (e).) The court explained the general bases for the sentence: "To the charge of violation of Penal Code section 245(a)(1), the Court has examined the factors in aggravation that have been set forth in the probation report and found to be so by the jury and also the factors in mitigation. This is a factor that was set by the probation report.[4] The Court also notes the defendant – the psychological issues raised in the psychological evaluation bearing upon the factors in mitigation and aggravation."[5]

The Court then explained that it would rely on a single aggravating factor to impose the upper term for the assault with a deadly weapon – Hollie's significant prior record (Cal. Rules of Court, rule 4.421(b)(2)) – but would not rely on the other aggravating factors found by the jury to be true or listed in the probation report. The full explanation was as follows: "Factors in aggravation include as were found by the jury

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[4] The single mitigating factor in the probation report is "Rule 4.423(b) (6): The defendant's prior performance on formal probation was satisfactory."

[5] According to the probation report, a May 20, 2007 psychological evaluation by Dr. Harriet Lehman opined that Hollie suffers from bipolar disorder "with prominent symptoms of disorganized thinking and a remitting depression."

under Rule 4.421(a)(1), the crime involved great violence or other acts disclosing a high degree of cruelty, viciousness, or callousness. This was part of the crime that was involved and cannot be reused again as an aggravating factor. [¶] Under Rule 4.421(a)(2), the defendant was armed with or used a weapon at the time of the commission of the crime. This also is an element of the crime and cannot be reused to aggravate. [¶] Under Rule 4.421(b)(1), the defendant has engaged in violent conduct which indicates a serious danger to society. I think that is self evident and is a component of the offense before the Court. [¶] Under Rule 4.421(b)(2), the defendant has a significant prior record and her record is increasing in seriousness. That is an independent factor in aggravation, and the Court is prepared to sentence the defendant to the high term of four years in this case."

With respect to the section 12022, subdivision (e) enhancement, the trial court did not explain which aggravating factor or factors it was relying upon to impose the upper term, but simply stated that "[w]ith respect to the element of personal infliction of great[] bodily injury under 12022 . . . , the Court will find the factors in aggravation outweigh the factors in mitigation and will impose the high term of five years consecutive . . . ." Counsel did not object during or after the pronouncement of Hollie's sentence.

b. Analysis

Hollie argues that, while the trial court may have correctly relied on her prior convictions to impose the upper term on the underlying assault with a deadly weapon (ADW) count, imposition of the upper term on the GBI enhancement violated dual use proscriptions as well as her federal constitutional rights as set forth in *Cunningham*. Hollie also argues that to the extent that her trial counsel improperly failed to object on dual use or *Cunningham* grounds at the time of sentencing, then her trial counsel provided ineffective assistance in violation of her rights under the Sixth and Fourteenth Amendments to the federal constitution.

We conclude that imposing the upper term on the enhancement based on the aggravating factors set forth in the probation officer's report and discussed at the time of sentencing would have violated dual use proscriptions. However, it is unclear from the

record whether the trial court in fact relied on those particular aggravating factors in imposing the upper term. Because of this ambiguity, and because the court expressed concern about dual use problems during the sentencing hearing, we also conclude that Hollie's counsel provided her with ineffective assistance by failing to object when the court announced the sentence. Consequently, the matter should be remanded for the limited purpose of resentencing.

Our Supreme Court in *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*), explained that "[a]lthough a single factor may be relevant to more than one sentencing choice, such dual or overlapping use is prohibited to some extent. For example, the court generally cannot use a single fact both to aggravate the base term and to impose an enhancement, nor may it use a fact constituting an element of the offense either to aggravate or to enhance a sentence." (*Id*. at p. 350; see also Cal. Rules of Court, rule 4.420(d) ["a fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term"]; § 1170, subd. (b) [a court "may not impose an upper term by using the fact of any enhancement upon which sentence is imposed"].) Similarly, "[t]he same fact cannot be used to impose an upper term on a base count and an upper term for an enhancement." (*People v. Velasquez* (2007) 152 Cal.App.4th 1503, 1516, fn. 12 (*Velasquez*).)

Based on these authorities, the sentencing court here did not violate any dual use proscriptions when it relied on Hollie's significant prior record and the fact that it was increasing in seriousness (Cal. Rules of Court, rule 4.421(b)(2)) to impose the upper term on the ADW count. (See also *People v. Black* (2007) 41 Cal.4th 799, 805, 816, 818 [there was no *Cunningham* violation either].) However, the court could not use that same aggravating factor to impose the upper term on the GBI enhancement. (*Velasquez, supra*, 152 Cal.App.4th at p. 1516, fn. 12.)

Moreover, the court could *not* have properly relied on the other three aggravating factors in the probation officer's report to impose the upper term on the GBI enhancement. In a nutshell, using any of those three aggravating factors would have been

tantamount to using the fact that Hollie stabbed Ingram with a knife both to impose the GBI enhancement itself and to impose an aggravated term for that enhancement.

While actual infliction of GBI is not an element of ADW (§ 245, subd. (a)(1); *People v. Rodriguez* (1998) 17 Cal.4th 253, 261), it obviously is an element of the GBI enhancement. (§ 12022.7, subd. (e).) There was no substantial evidence in this case that Hollie inflicted GBI by any means other than by using the knife to stab Ingram. (Cf. *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1777 (*Garcia*) [there was no dual use problem where there "was substantial evidence . . . that defendant threatened the victims with great bodily injury by means distinct from his gun use"].)[6] Consequently, the sentencing court could not rely upon the fact that Hollie inflicted GBI, or the fact that she used a knife to do so, to impose the upper term on the GBI enhancement. To do so would constitute an improper dual use of the same fact both to impose an enhancement and to impose the upper term on the same enhancement. (*Scott, supra,* 9 Cal.4th at p. 350; *Garcia, supra,* 32 Cal.App.4th at p. 1777; *People v. Coleman* (1989) 48 Cal.3d 112, 165 ["On remand, the trial court should avoid any reliance on the same fact (e.g., defendant's use of the knife) for both an upper term and an enhancement"].)

Both of the aggravating factors found true by the jury were based on the fact that Hollie inflicted GBI with the knife: 1) the crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness; and (2) Hollie was armed with or used a weapon at the time of the commission of the crime. (Cal. Rules of Court, rule 4.421(a)(1), (2).) Consequently, if the court relied on either of these two aggravating circumstances to impose the upper term on the GBI enhancement, there was an impermissible dual use of a single fact. (See *People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1028 [with respect to "the great violence/threat of great bodily harm factor," noting that the "only conclusion the evidence permits is that it was only the presence of the firearms that justified a fact

[6] Hollie testified that she sprayed Ingram with an aerosol can of air freshener. However, there was no evidence that spraying Ingram caused him to suffer any injuries.

finding that there was threat of great bodily harm"]; *People v. Bennett* (1981) 128 Cal.App.3d 354, 359 [there was improper dual use where the gun use which was the basis of a firearm enhancement was also relied upon to impose upper terms on the robbery counts and where the only evidence of a threat of great bodily harm with respect to the great violence/threat of great bodily harm factor was "the gun use itself"]; *People v. Calhoun* (1981) 125 Cal.App.3d 731, 734 ["where the threat of violence is based on the use of a weapon, the sentencing court may not use this fact to both aggravate and enhance the defendant's sentence"].)

The final aggravating factor from the probation officer's report is "Rule 4.421 (b)(1): The defendant has engaged in violent conduct which indicates a serious danger to society." The jury was not asked to consider this factor. The trial court concluded with respect to the ADW count that this factor "is a component of the offense before the Court." We agree with the trial court that this factor encompasses an element of the base conviction, because the only "violent conduct" posing a "serious danger to society" here was Hollie's use of the knife to stab Ingram. (See *People v. Smith* (1997) 57 Cal.App.4th 1470, 1481 [ADW consists of "two elements, (1) the assault, and (2) the means by which the assault is committed"].) For the same reason, it also encompasses the GBI element of the GBI enhancement and could not be used to impose the upper term on the enhancement. (§ 12022.7, subd. (e); *Scott, supra,* 9 Cal.4th at p. 350.)

Based on the foregoing, it is clear that in imposing the upper term on the GBI enhancement, the trial court should not have relied on any of the aggravating factors which were set forth in the probation officer's report and which the court discussed in the context of imposing the upper term for the ADW count. If this is what the sentencing court did, such an error would require remand for resentencing because it would be reasonably probable that on remand Hollie would be sentenced to the middle term on the GBI enhancement, shortening her sentence by a full year. (See *People v. Price* (1991) 1 Cal.4th 324, 492 [the prejudice standard for remand for resentencing]; § 12022.7, subd. (e) [the upper term for this GBI enhancement is 5 years; the middle term is 4 years].)

However, it is not clear whether the trial court in fact relied on those factors in imposing the upper term for the GBI enhancement. The court apparently was well aware of the dual use issues with respect to the base count for ADW: it discussed the issue during the sentencing hearing and was careful to avoid relying on anything but Hollie's prior criminal record when imposing the upper term for the base count. However, there was no discussion during the sentencing hearing about the dual use issues posed specifically by the GBI enhancement, and the court did not explain which aggravating factors it was relying upon to impose the upper term on that enhancement. Instead, the court ambiguously stated that it was imposing the upper term on the enhancement because "the factors in aggravation outweigh the factors in mitigation."

The Attorney General asserts that "[d]ual use of facts is not apparent from this statement" by the sentencing court. However, that is precisely the problem – we cannot tell what the court was relying upon in imposing the upper term on the GBI enhancement. The court had an obligation to "state 'reasons' for its discretionary choices on the record at the time of sentencing. [Citations.] Such reasons must be supported by a preponderance of the evidence in the record and must 'reasonably relat[e]' to the particular sentencing determination. [Citations.] No particular wording is required, but courts typically rely on applicable sentencing factors set forth in the statutory scheme and the rules." (*Scott, supra*, 9 Cal.4th at pp. 349-350, fn. omitted.) This rule applies to enhancements as well as to underlying substantive offenses. (*Id*. at p. 350, fn. 13.) The "purpose for requiring the court to orally announce its reasons at sentencing is clear. The requirement encourages the careful exercise of discretion and decreases the risk of error. . . . The statement of reasons also supplies the reviewing court with information needed to assess the merits of any sentencing claim and the prejudicial effect of any error." (*Id*. at p. 351.)

As noted above, Hollie's counsel raised the dual use issue in his sentencing brief with respect to both the base count and the GBI enhancement, and briefly raised the dual use issue in general terms during the initial portion of the sentencing hearing. However, counsel failed to raise the issue specifically with respect to the GBI enhancement during

the hearing, and he did not object when the trial court imposed the upper term on the GBI enhancement. "The record is clear that [Hollie's] counsel was well aware of the court's sentencing choices and had a meaningful opportunity to object." (*People v. Velasquez, supra,* 152 Cal.App.4th 1503, 1511.) As discussed above, the sentencing court went out of its way to avoid a dual use problem, and undoubtedly would have been responsive to an objection by Hollie's counsel at the time it imposed the upper term on the GBI enhancement. Consequently, "by failing to object, [Hollie] has forfeited his claim the upper term[is] improper because the trial court did not state its reasons for selecting [that term.]" (*Ibid*.) But even if Hollie did forfeit the sentencing error here, we must still remand the matter for resentencing. Hollie has asserted a valid claim of IAC based on her counsel's failure to object.

To establish IAC, a defendant must prove that her counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that there is a " 'reasonable probability' " that she would have obtained a more favorable result had her counsel acted competently. (*People v. Dennis* (1998) 17 Cal.4th 468, 540.) We have already addressed the prejudice prong: based on the court's express intent during the sentencing hearing to avoid a dual use problem and the fact that *none* of the aggravating circumstances listed in the probation officer's report and discussed at the sentencing hearing provided a proper basis for imposing the upper term, it is reasonably probable that had Hollie's counsel objected, Hollie would have received a shorter sentence. (See also *Scott, supra*, 9 Cal.4th at p. 355 [When the trial court "errs in identifying or articulating its sentencing choices, the reviewing court has no choice but to remand the matter for resentencing unless it finds the error nonprejudicial, i.e., it is 'not reasonably probable that a more favorable sentence would have been imposed in the absence of the error' "].)

We also conclude that Hollie's counsel's performance fell below the applicable standard of reasonableness. "Under existing law, a defense attorney who fails to adequately understand the available sentencing alternatives, promote their proper application, or pursue the most advantageous disposition for his client may be found

incompetent." (*Scott, supra*, 9 Cal.4th at p. 351.) While Hollie's counsel apparently understood the sentencing alternatives, he failed to adequately promote their proper application or to pursue the most advantageous disposition for Hollie when he remained silent as the court imposed the upper term.

Finally, we can conceive of no tactical reason for defense counsel not to object in this situation. (See *People v. Majors* (1998) 18 Cal.4th 385, 403 [to establish IAC on direct appeal, the record must affirmatively disclose that counsel lacked a rational tactical basis for the challenged omission].) The Attorney General asserts that Hollie's counsel "could easily have concluded that an objection to the trial court's statement of reasons would simply have resulted in the court justifying the aggravated term for the enhancement by reference to other factors." Significantly, the Attorney General fails to identify which other factors the court could have relied upon. And none of the factors in the probation officer's report or discussed during the hearing could have provided a proper basis to impose the aggravated term. Moreover, prompting the trial court to justify imposition of the upper term by reference to other factors is precisely the reason an objection was necessary. (See *Scott, supra*, 9 Cal.4th at pp. 351.) Again, the record indicates that the sentencing court probably would have been very receptive to an objection. Here, " 'there simply could be no satisfactory explanation' " (*People v. Hinds* (2003) 108 Cal.App.4th 897, 901) for failing to object.

DISPOSITION

The judgment is reversed and the matter remanded for the purpose of resentencing consistent with this opinion.

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Richman, J.

We concur:

_____
Kline, P.J.

_____
Lambden, J.